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IN THE

Supreme Court of the United States

October Term, 1941
No. 924

ARSENAL BUILDING CORPORATION
AND SPEAR & CO. INC.,
Petitioners,

AGAINST

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

ARSENAL BUILDING CORPORATION and SPEAR & CO. INC., *Petitioners,* *against* L. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor, *Respondent.*	No. 924

BRIEF FOR PETITIONERS.

Statement.

This case is before this Court on certiorari granted March 2, 1942.

By order filed March 16, 1942, L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, was substituted as party respondent in place and stead of Philip B. Fleming, resigned. There has been no other change of parties.

For convenient reference, the petitioners are sometimes referred to hereinafter as defendants, and respondent as plaintiff.

Respondent sought an injunction restraining petitioners from violating the Fair Labor Standards Act of 1938 (Act

of June 25, 1938, c. 676, 52 Stat. 1060, U. S. C. Title 29, Sec. 201 *et seq.*). The opinion of the United States District Court for the Southern District of New York denying relief (R. 330) is reported in 38 Fed. Supp. 207, and the opinion of the United States Circuit Court of Appeals for the Second Circuit reversing the District Court (R. 343) is reported in 125 Fed. 2d 278.

Jurisdiction.

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Judicial Code, Sec. 240, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C., Title 28, Sec. 347).

Specification of Assigned Errors.

The Circuit Court erred as follows:

1. In holding that the employees of the Arsenal Building Corporation produced goods for commerce within the meaning of the Act.
2. In holding that Arsenal Building Corporation and Spear & Co. Inc. produced goods for commerce within the meaning of the Act.
3. In holding that the employees of the Arsenal Building Corporation were not employees of a service establishment within the meaning of the Act.
4. In failing to hold that the Act was not applicable to defendant's employees because their employer was not itself engaged in commerce, or the production of goods for commerce.

5. In omitting to hold that the Act, as interpreted by the Circuit Court, was unconstitutional for lack of congressional power.

Findings of Fact.

(R. 326-9)

The defendants are both New York corporations. The Arsenal Building Corporation owns a twenty-two story loft building in New York City, which, in turn, is managed by defendant, Spear and Company, as Agent.

With minor exceptions, the tenants, and their employees, operate in said building, in the production of ladies' garments for interstate commerce, and the purchase and sale of ladies' garments for interstate commerce but there is no business relation between the tenants and either of the defendants other than that of landlord and tenant.

The sole business of the Arsenal Corporation is that of a real estate operation in leasing space in said building and rendering service incident thereto.

The sole activity of defendant, Spear and Company, in said building is its management and operation thereof as a loft building to be leased.

In this connection, Arsenal Corporation, through Spear and Company, employs about twenty-six employees to supply the ordinary type of service incident to the operation and maintenance of such a building. These employees service and maintain the building as a whole, but do not render service to the tenants, or care for the leased premises, except to operate passenger and freight elevators, and, occasionally, to enter these premises in case of leaks or fire, and to repair windows, when damage to the building as a whole is threatened. The keys of the leased premises are in the custody of the tenants and none of the employees of defendant, Arsenal Corporation, have access to them, or to the leased premises.

> "None of the employees of Arsenal Building Corporation produces, manufactures, mines, handles, processes, or in any other manner touches, for the purpose of production, or works upon the goods produced by any of the tenants of Arsenal Building Corporation, and none of said employees transports any of said goods, except that some of said employees, as an incident to the general operation of said building, operate elevators which carry said goods of said tenants" (R. 327).

The duties of the twenty-six employees are briefly outlined.

The superintendent directs the building service employees and performs certain mechanical and maintenance work.

The building mechanic or handyman performs odd jobs around the building other than in the leased premises and assists the superintendent.

The freight elevator starter directs the five freight elevator operators in respect to their operation of four freight elevators. From time to time he relieves one of said freight elevator operators in the operation of an elevator.

One elevator starter and one assistant starter direct six operators, in the operation of the five passenger elevators and on occasion the assistant starter relieves one of the said elevator operators.

Six porters clean, polish and otherwise maintain public halls, stairways, lavatories, etc., and on occasion, as relief men, operate an elevator.

Two watchmen patrol the public places, perform some cleaning work, and on occasion operate an elevator.

Two firemen care for boilers, pumps and like equipment.

Arsenal Corporation buys electric current from the Consolidated Edison Company, and resells it to tenants through facilities furnished by a sub-metering company.

The building furnishes water for the public lavatories and the automatic sprinkler system, and to the tenants for their use in their businesses. (This does not mean hot water for the productive process of manufacturing tenants as stated by the Circuit Court). The landlord likewise supplies radiator heat for the leased premises.

> "In general, the duties of the building service employees of said building are limited to heating said building, keeping it in repair, protecting it from damage, cleaning the public halls, stairways, and spaces occupied by the common utilities of the building, keeping the public lavatories clean, and operating freight and passenger elevators for the tenants, for the employees of the carriers who fetch goods from or deliver goods to tenants, for the employees of tenants and the freight which is always in the custody of employees of carriers—brought to and shipped out by the tenants, and, in general, said employees, in fact, confine their activities to the performance of said duties" (R. 328).

The building makes no repairs or alterations in leased premises except where it agrees to do so as a condition of signing or renewing a lease, in order to adapt the leased premises to the requirements of the lease, and usually this work is done by outside contractors hired for such purpose. It is not the duty of the employees of the Arsenal Corporation to perform any work in the leased premises, except where it is necessary to do so for the general safety and preservation of the building, and the Arsenal Corporation employees so limit their activities, except occasionally when some of them do favors on their own time for tenants, for which the tenant tips them.

The Arsenal Corporation employees are compensated at rates in excess of those set forth in Section 6 of the Fair Labor Standards Act, but they are employed a number of hours weekly in excess of those set forth in Section 7 of that Act, and are not compensated for all such excess hours at the rate of time and one-half.

Upon these facts the District Court denied relief, holding that neither the defendants nor the building service employees were engaged in commerce or in the production of goods for commerce, and that defendants were service establishments exempted from the law.

The Circuit Court of Appeals, in an opinion, which we submit is unconvincing and lacks conviction, reversed the decision of the District Court and ruled seriatim as follows:

1. The employees in question are engaged in the production of goods for commerce because they are engaged in the performance of services which are appropriate to manufacture, and because warm and clean buildings, light and power and elevator transportation from one story to another constitute services as necessary to production as the services of cutters and stitchers in the production of garments.

2. The employees are not exempted from the Act as employees of a "service establishment" because the test is as to whether the servicing is of an interstate or intrastate character, and, therefore, since these employees are engaged in producing goods for interstate commerce, they are not exempt as a "service establishment".

3. The argument of the defendants that the defendant-employer as well as the employees must be but was not engaged in commerce, or the production of goods for commerce, was rejected. The Court reached the astounding conclusion that a landlord and his managing agent are engaged in producing goods.

4. Having disposed of the case, on the ground that the employees were engaged in the production of goods for commerce, the Circuit Court did not find it necessary to decide the question as to whether the employees were actually engaged in commerce.

Argument.

In opposing the conclusions of the Circuit Court the defendants submit their argument under the following captions:

I.

According to established decisions, this Court will not infer a Congressional intention to invade State sovereignty in respect to the local control and regulation of real estate.

II.

The employees of Arsenal Building Corporation are not engaged in the production of goods for commerce within the meaning of the Act.

III.

The employees of Arsenal Building Corporation are not engaged in commerce within the meaning of the Act.

IV.

The employees of Arsenal Building Corporation are engaged in working in a "service establishment" exempted from the Fair Labor Standards Act.

V.

The Act applies only to employees of employers engaged in commerce, or the production of goods for commerce, and then only to such of said employees as are themselves engaged in commerce, or the production of goods for commerce.

VI.

If the Act were interpreted to apply to the employees of the Arsenal Building Corporation, it would be void for lack of Congressional power.

POINT I.

According to established decisions this Court will not infer a Congressional intention to invade State sovereignty in respect to the local control and regulation of real estate.

In the recent case of *Federal Trade Commission* v. *Bunte Brothers Inc.*, 312 U. S. 349, this Court considered Section 5 of the Federal Trade Commission Act, giving the Commission power to prevent "unfair methods of competition in (interstate) commerce". The precise question was whether the Commission could forbid unfair methods of competition in purely intrastate transactions upon the ground that such transactions affected interstate commerce. This Court held that the Commission had no such power, stating (p. 351):

> "When in order to protect interstate commerce Congress has regulated activities, which in isolation are merely local, it has normally conveyed its purpose explicitly. See for example, National Labor Relations Act * * * Bituminous Coal Act * * * Federal Employers Liability Act * * * ."

Again, this Court said (p. 355):

> "And we merely hold that to read 'unfair methods of competition in (interstate) commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce' requires in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished."

Another example is the comparison between the National Labor Relations Act, on the one hand, with the Sherman Anti-Trust Act, and the Fair Labor Standards Act. As pointed out in the opinion of Judge WOOLSEY in the District Court, the bill which led to the Fair Labor Standards Act covered all production "affecting commerce", but this broad language was finally abandoned so that the Act was limited to employers and employees in interstate commerce and the production of goods for interstate commerce.

83 Cong. Rec. 9246;
Law and Contemporary Problems, Duke University, Summer, 1939, issue, pp. 338-9.

This left a marked contrast between the broader language of the National Labor Relations Act, which extends to employment relations in occupations "affecting" interstate commerce, and the Fair Labor Standards Act. The significance of this contrast becomes clear upon reading the case of *Apex Hosiery Company* v. *Leader*, 310 U. S. 469, where it was pointed out that the Sherman Anti-Trust Law, unlike the National Labor Relations Act, did not apply to all situations "affecting" commerce. The deliberate removal of the words "affecting commerce" after Congress had before it one Act with those words, and another Act without those words, would seem to be a clear indication of its intention to confine this legislation to the same limits as were covered by the Sherman Anti-Trust Law.

Jewel Tea Co. v. *Williams*, 118 Fed. (2d) 202;
Fleming v. *Goldblatt Bros. Inc.*, 39 Fed. Supp. 700.

It certainly would require compelling words to impute to Congress the intention of taking over the control of employment relations of elevator operators in New York buildings, for such an effort would be revolutionary and would raise grave constitutional questions.

Bearing in mind the historical background of the Act, the recital in Section 2 that it is aimed at "industries engaged in commerce or in the production of goods for commerce", with a view to protecting labor against sub-standard competition through interstate commerce, we submit that the interpretation urged in this brief meets all the requirements of liberal construction which should be given to remedial statutes, and is more consonant with the general concept and purpose of the Act than is the strained impractical contention of the plaintiff with its inroads upon state rights. The management and operation of buildings is essentially a local business, the last of which Congress would be presumed to regulate. The cost of building service is such a small part of the cost which a manufacturing tenant has to pay as reflected in his rent, that it is negligible (R. 232-3). Taxes and mortgage interest are a far greater item of expense, and certainly Congress would not feel that it should regulate them, on the ground that it affected the price of the goods manufactured by a tenant in a building which is subject to the burdens of taxation and mortgage interest.

On this point the Court should also consider the cases reviewed in Point II of this brief, to the effect that Acts of this nature are not presumed to extend to independent facilities even though they may be part of a step in an interstate course of trade.

The history of the decisions and legislation in respect to the Second Federal Employers' Liability Act further bear out this same conclusion. As that act was originally passed it was interpreted by the Court to exclude employees rendering incidental services connected with interstate transportation and commerce.

Delaware, L. & W. R. Co. v. *Yurkonis*, 238 U. S. 439 (coal mining);

Chicago & E. I. R. Co. v. *Ind. Comm.*, 284 U. S. 296 (maintenance);

Shanks v. *Delaware L. & W. R. Co.*, 239 U. S. 556 (maintenance);

Chicago B. & Q. R. Co. v. *Harrington*, 241 U. S. 177 (coaling an engine);

Minneapolis & St. L. R. Co. v. *Nash*, 242 U. S. 619 (carpenter on depot);

Southern R. Co. v. Taylor, 16 Fed. 2d 517 (elevator operator in railroad office building).

Following these decisions the matter again came before Congress with a view to so broadening the Act as to cover some of the very activities which in the foregoing decisions had been held excluded. The Act was thereupon amended so as to cover employees, any part of whose duties are in "furtherance of interstate commerce", or "in any way directly or closely or substantially affect such commerce".

Act of August 11, 1939, c. 685, 53 Stat. 1404, U. S. C. Title 45, Sec. 51.

Another illustration of this same principle is found in the history of the Interstate Commerce Act and the judicial pronouncements in respect thereto. In the case of the *Illinois Central Railroad Company* v. *Public Utilities Commission*, 245 U. S. 493 (1917), at page 510, the Court held:

> "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless and except so far as its purpose to do so is clearly manifested. *Reid*

v. *Colorado*, 187 U. S. 137, 148; *Cummings* v. *Chicago*, 188 U. S. 410, 430; *Savage* v. *Jones*, 225 U. S. 501; *Missouri, Kansas & Texas Ry. Co.* v. *Harris*, 234 U. S. 412, 419."

Because of this doctrine,—since the Court had previously held in *Houston & Texas Railway* v. *U. S.*, 234 U. S. 342, at page 357, that the Interstate Commerce Act at that time did not fully extend to intrastate traffic in certain important particulars,—the next act of Congress dealing with this subject, which was the Transportation Act of February 28, 1920, remedied the situation by providing specifically (c. 91, Sec. 416, Pars. 3 and 4; 41 Stat. 484, Pars. 3 and 4; U. S. C., Title 49, Sec. 13, Pars. 3 and 4) for the broader inclusion of intrastate rates under certain regulations and conditions. The history of this development is set forth in the statements of Senator Cummings of Iowa in connection with the discussions of a bill which ended in the Transportation Act, when he was speaking as Chairman for the Senate Committee having the act in charge (59 Cong. Rec., pp. 141-3).

Following the recognized judicial pronouncements in respect to legislation of this character,—whether we consider the Federal Trade Commission Act, the Sherman Anti-Trust Law, the National Labor Relations Act, the Employers' Liability Act, the Interstate Commerce Act, or the Fair Labor Standards Act,—it appears to be settled law that Congress will not be presumed to intend to go beyond the interstate field and to enter the field of intrastate activities which affect interstate commerce unless the intention so to do is clearly expressed in the statute.

POINT II.

The employees of Arsenal Building Corporation are not engaged in the production of goods for commerce within the meaning of the Act.

The Circuit Court ruled that the service employees of the landlord-defendant were engaged in the production of goods for commerce within the meaning of Section 3(j) of the Act and rested its decision primarily on that conclusion. With this ruling we take issue.

The employees of Arsenal Building Corporation do no work on the manufacturers' premises, or on their products and in no sense are a part of the manufacturing enterprises. The elevator operators, like truckmen on the public streets, operate vehicles which carry raw materials to the threshold of the producer's premises before production begins, and which, thereafter, carry away the finished product after it has crossed the threshold of the producer's premises to the public corridors. Unlike independent truckmen, these vehicles of vertical transportation, and their operators, do not even cross the manufacturers' property line in performing this function. Occasionally, like truckmen on a public street, they may perform a like function on goods in a semi-finished state, in order that they may be taken to some outside contractor in some other building to perform some work thereon, and may then be returned to the original manufacturer either as a partly or wholly finished product. Even then, it is merely a means of bringing the goods to a place where they can be produced, and taking them away after they are produced. None of this service, however, is an incident to production. It is applied before the function of the receiving clerk begins and after the function of the shipping clerk is finished.

Section 3(j) of the Act reads as follows:

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

In construing this paragraph of the Act, we prefer to present two alternative arguments, as follows:

A. Section 3(j) covers only employees who actually produce, transport or work on the goods for commerce in the course of their production, or who do the equivalent by working on "any process or occupation necessary to the production thereof"; it, therefore, excludes employees who perform service before production begins, or after production ends, as well as incidental employees in a factory who are not directly identifiable with the production of a particular lot of goods.

B. Certain marginal employees not directly connected with production may be covered when directly employed by the producer as a part of the production establishment, but are not covered when employed by a local employer operating elsewhere and independently in another line of business, but taking contracts from the prime producer.

A.

Section 3(j) covers only employees who actually produce, transport or work on the goods for commerce in the course of their production, or who do the equivalent by working on "any process or occupation necessary to the production thereof"; it therefore excludes employees who perform service before production begins or after production ends, as well as incidental employees in a factory who are not directly identifiable with the production of a particular lot of goods.

It is conceded that all employees of the production establishment are not covered, as the Act was carefully drafted to exclude employees not actually engaged in production of goods for commerce.

Senator Pepper, one of the conferees on this Act, made this clear by stating on the floor of the Senate (83 Cong. Rec. 9168):

> "The conference committee had before it the question of whether this proposed law should be applied to all employees of an industry which itself is engaged in interstate commerce although the individual employees may not necessarily themselves be engaged in interstate commerce or whether its application should be applied or made to the employees themselves who were engaged either in interstate commerce or in the production of goods for interstate commerce.
>
> * * * * * *
>
> "I want it distinctly stated that this proposed law is not applicable to all employees of an industry which itself is engaged in interstate commerce. It is applicable only to those employees who themselves are engaged either in interstate commerce or the production of goods for interstate commerce, and the contrary theory was definitely rejected by the committee."

As pointed out in Section 15(b), employment in the production establishment is only *prima facie* proof that the employee was engaged in the production of the goods. The statute, moreover, in Section 3(j), emphasizes the point by limiting the act to employees "necessary" to production; and what may, in a broad way be necessary for a business *enterprise*, may not be necessary for production.

> *Abadie* v. *Cudahy Packing Co.*, 37 Fed. Supp. 164 (La., 1941).

At no time during this litigation has our adversary indicated which employees of a manufacturing establishment producing for commerce are in the exempted class.

The Walsh-Healey Act (Act of June 30, 1936, c. 881, 49 Stat. 2036-39, U. S. C., Title 41, Sections 34-45) provides that in certain Government contracts there must be inserted a stipulation:

> "That all persons employed by the contractor in *the manufacture or furnishing* of the materials" etc. (Sec. 1(b))

must be paid a certain minimum wage. But the Administrator of the Act has ruled that employees not engaged in manufacturing, handling, supervising or shipping such materials as well as custodial employees are not covered by the Statute.

We contend that bookkeepers, typists, trained nurses, doctors, dentists, restaurant waiters, maintenance employees and the like—even when employed in the production establishment—are not engaged in an occupation necessary to production of goods earmarked for interstate commerce. Their services are too general and indirect to be allocated to the goods which the statute pursues. Our contention as to the interpretation of the word "transporting", and the words "process or occupation necessary to the production", as used in Section 3(j), all stem from the same

argument that this subdivision is merely a definition of the word "produced", and of those "engaged in the production of goods". The entire paragraph is designed to cover all activities of workers having immediately to do with production of goods for commerce and nothing more.

It is employee contribution to the production of goods which is the test—not his association with the enterprise. The Act follows the goods. It has no application unless the goods enter interstate commerce. It excludes from its application any employee in a factory who is not identified with the production work of goods for commerce. If the service performed, like that of truckmen, is before production begins, or after it ends, the employee is obviously not covered. Moreover, the fact that he works in the place where and while the goods are produced is only *prima facie* proof that he helped to produce the particular goods. He must be a production employee rather than an employee whose wages would ordinarily be charged to overhead. He must actually be so engaged in the production of such goods, that he is identified with goods intended for interstate commerce; not one performing service of such a general or indirect nature that it applies to the operation of the enterprise as a whole without relationship to particular goods or lots of goods. The services must be *necessary to production.* Bookkeepers, clerical help and watchmen are not ordinarily of that class. They no more contribute to production than does the toolmaker to bookkeeping.

With these facts and claims in mind, let us analyze the language of Section 3(j) more in detail. All of its language, including the word "transporting", relates to services ordinarily performed in or about the production—not services affecting production. An employee is "engaged in the production of goods", if he is employed in "handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof *in any State*". These are local activities in fabricating the goods or in handling or moving the

goods as a part of the manufacturing process or enterprise. Outside transportation is not necessary to the production process. It does not necessarily take place merely "in any State." Like commerce, as distinguished from manufacturing, it is not production.

Anderson v. *Shipowners' Ass'n.* 272 U. S. 359;
U. S. v. *Knight*, 156 U. S. 1;
New York ex rel. Pa. Railroad Co. v. *Knight*;
192 U. S. 21.

The word "transporting" connected with production merely applies to the movement of goods in or around the producing plant, and was one of a series of words designed to cover every form of activity directly incident to production of the particular goods in question in the plant. The operation of cranes, pushcarts and electrically driven cars, which are all incident to production, would be embraced by the word "transporting." On the other hand, when the goods are completed to the extent that the producing plant finishes its work in connection therewith, and they are shipped out to be carried to customers, either through vertical or horizontal transportation, this provision relating to production has no application. When independent truckers, hired by the Garment Manufacturers, call at the manufacturers' premises for the goods, and place them on the elevators, and then on their trucks, they act only after the application of this definition of "production of goods" is exhausted. That movement is not a part of production and is not a process or occupation necessary to production any more than banking or credit is production. That movement only commences after production ceases and the manufactured product has left the manufacturers' premises.

By including "any process or occupation necessary to the production thereof in any State", Congress was aiming

only to catch all production activities in goods for interstate commerce. Processing, as used here, and as disclosed by the dictionaries, is a part of manufacturing or production.

Lakeshire Cheese Co. v. *Shefford Cheese Co.*, 72 Fed. 2nd 497, 499;
Smith Eng. Works v. *Nordberg Mfg. Co.*, 68 Fed. 2nd 492, 493;
Fleming v. *Hawkeye Pearl Button Co.*, 113 Fed. 2nd 52.

An occupation necessary to production would include an employee standing around as a helper, or mixing ingredients for the use of other productive employees working on goods for commerce, but no "process or occupation" entirely separate and independent from production of particular goods, even though it might be essential for the operation of the enterprise, is intended to be covered. Independent contractors to wash windows, press uniforms and audit books, are therefore outside the scope of this section.

We contend that it is not enough to show that the employing company is engaged in producing goods for interstate commerce, and that the employee is employed by the company in some capacity. It must be further shown by *prima facie* presumption or otherwise that the particular employee is actually engaged by his employer in producing definite lots of goods for commerce.

Rogers v. *Glazer*, 32 Fed. Supp. 990 (1940);
New Amsterdam Co. v. *Commission*, 89 Okla. 7; 193 Pac. 974;
Baggett v. *Henry Fischer Packing Company*, 37 Fed. Supp. 670.

There are also fundamental arguments against stretching this definition of the word "produced" to include local activities involving the care and servicing of real estate where it appears that such activities are not a part of production, and are performed by an independent contractor whose enterprise is not production or commerce.

Brandell v. *Continental Illinois Bank and Trust Co.*, Fed. Supp. ;
5 Labor Cases, C.C.H. par. 60, 876 (U. S. D. C., N. D. Ill. Dec. 5, 1941);
Cecil v. *Gradison*, Ohio App. ;
5 Labor Cases, C.C.H. par. 60, 799 (Ohio Ct. Appeals, Nov. 17, 1941);
Merryfield v. *Hoyt Shoe Co.*, 41 Fed. Supp. 794;
Pederson v. *Fitzgerald Construction Co.*, 262 App. Div. 665;
Robinson v. *Massachusetts Mutual Life Insurance Co.*, 158 S. W. 2d 441 (Tenn. Sup. Ct. 1941).

Moreover, as urged in Point I, *supra*, by removing the words "affecting commerce" from the bill, Congress indicated an intent for a narrower application of the Act.

B.

Certain marginal employees not directly connected with production may be covered when directly employed by the producers as a part of the production establishment, but are not covered when employed by a local employer operating elsewhere and independently in another line of business, but taking contracts from the prime producer.

It is only after rejecting our Point "A" that it is necessary in this case to consider this Point "B". Headnote "B" reflects the doctrine of the New York Appellate Division in the case of *Killingbeck* v. *Garment Center Capitol, Inc.*, 259 A. D. 691. Certainly, there would be no *prima*

facie presumption that employees of an independent employer were covered under Section 15(b). The practical common sense of this limitation, if our contention under "A" is rejected, is easily illustrated by the situation of waiters in restaurants. If the waiters were in a restaurant maintained in the factory by the manufacturers, there is one situation. If the waiters are employed in a nearby restaurant which depends largely on the patronage of employees who work in a factory producing goods for interstate commerce, the picture is quite different from a realistic point of view. The employees fed at the public restaurant may have spent half the morning producing goods for interstate commerce, and half the morning producing goods for intrastate commerce. Unless the act of the restaurant employees in feeding the manufacturers' employees can be identified with the production of particular goods for commerce, they cannot be covered. It is, therefore, beyond reason to adopt such a construction, or to impute to Congress an intention of such a character. On the other hand, if we apply the Act to employees of a restaurant operated incidentally in connection with the factory, we have at least the provision that they are *prima facie* presumed to have produced the goods for commerce.

This argument of defendants does not mean that a manufacturer might escape the Act, as applied to employees in some departments, by subcontracting to a local employer the work of performing some of the production processes. Thus, the garment manufacturer might not circumvent the Act by disintegrating his establishment and giving to separate contractors the work of (1) dyeing, (2) cutting, and (3) sewing. Our contention on this point does not go so far. It does not need to be extended to employees of local manufacturers who actually work on or produce the goods for commerce.

But even that question is not now presented. For the purpose of this case it is only necessary to contend that such incidental employees, as clerks, stenographers, restaurant waiters, watchmen and cleaning women, whose services cannot be identified with particular goods, are one step further from coverage when employed by independent local employers, and that any construction of the Act, which would include them, would run counter to the presumable intention of Congress, and would wreck the Act on the reef of unconstitutionality. Such employees are neither connected with the employer or the goods having to do with interstate commerce.

If we test the question by the scope of the production enterprise of a particular manufacturer, the argument goes further. The manufacturer of buttons, the manufacturer of garments who produces his own buttons, and the manufacturer of garments who buys his buttons, present different pictures. Some manufacturers have vertical integration and some do not. It is the scope of their particular production activities which is important. In the case of the garment manufacturer who makes his own buttons, the production of garments includes the buttons. In the case of the garment manufacturer who buys his buttons, the manufacture of buttons does not come within his production process, and the status of the employees who make buttons, depends on the business and decisions of their employer, and not upon what is done from day to day by his ever changing group of customers. Otherwise, the status of the wool grower and flax grower would be controlled by the ultimate flow of the garments made from the cloth, made from the linen and wool produced by the grower. Or more complicated still, the status of each employee producing wool might depend upon whether that wool was to be used for goods in interstate commerce or intrastate commerce.

To state our contention in another way, we urge that employees of independent contractors engaged in the local business cannot logically be brought within the purview of the Act, by reason of some unstable and fortuitous connection between that local employer and some other employer producing goods for interstate commerce. The character of that local business, and the laws under which its employees work, should not be subject to variable and changing decisions of others over whom the local contractor has no control. Thus, the manufacturer of sandpaper, or one who paints kitchen cabinets produced by others, may understand that the particular goods he is producing or working upon during the current week are to be used by the prime producer for interstate commerce. It may happen, however, that after the sandpaper is delivered, or the merchandise painted, the prime producer changes his mind and uses the sandpaper or cabinets in a way which does not concern interstate commerce. Likewise, the reverse may be true, and the painter or sandpaper manufacturer may perform without regard to federal law in the belief that the services rendered, or materials sold, relate to goods to be delivered within the state, but subsequently the buyer or prime manufacturer may change his mind. Thus, through the changing decisions and business policies of the customer of the local employer, over which the local employer has no control, the legal status of the local employer, and his employees, may be shifted from time to time.

A like difficulty is presented if the manufacturer of sandpaper, or any other manufacturer, produces for inventory without knowledge or intention as to whether the accumulated inventories will ultimately become a part of a product for interstate commerce or intrastate commerce. In many lines of manufacture, it becomes financially and socially desirable over long periods of time to accumulate large

inventories, with a view to smoothing out the fluctuations of seasonal employment, and preparing for speedy deliveries during peak periods.

It, therefore, seems reasonable to argue that the employees of an independent local producer, or contractor, do not ordinarily come under the Act, merely because they enjoy the patronage of others who produce in part for interstate commerce or furnish them with goods, service or space.

Puget Sound Stevedoring Co. v. *Tax Commission.* 302 U. S. 90.

The conclusion of the Administrator and of the Court below, that it is immaterial whether the services are rendered by the producer or an independent contractor offers no solution to the problem. The arguments in favor of this conclusion suggest no practical limitations or boundaries and therefore become useless as furnishing a rule or principle of any value. The validity of our decision must depend on its line of exclusion as well as inclusion. If as is the case so far with the decisions upholding the Administrator no line of demarcation and no terminal facilities are visible it becomes evident that the problem has not been met.

Plaintiff has relied upon the case of *Hall* v. *Warren-Bradshaw Drilling Co.*, 40 Fed. Supp. 272; aff'd 124 Fed. 2d 42, where it was held that the employees of a drilling company were covered when they were engaged in drilling to "bring in" an oil well which was later to be operated by another company in producing oil for interstate commerce. If plaintiff means, as he seems to mean, that all construction work in connection with some contemplated enterprise, and before the structures are actually put into operation for commerce, are covered by the Act, then we

submit that the decision is unsound and in conflict with well-known principles laid down in numerous cases.

New York Central R. R. v. *White*, 243 U. S. 188.

Appellant has admitted that the Act cannot apply to employees of hotels or apartment houses (R. 262). But why not? If restaurant employees feeding those employees who at times produce goods for commerce are covered, why not cooks and dining room employees of hotels, and if feeding employees is a part of the process of producing goods for commerce, does not the same argument apply to the housing of such employees? The plaintiff leaves the defendants and this Court—as he did the Court below—absolutely in the dark as to the rule which he applies in reaching what appear to be such conflicting conclusions.

POINT III.

The employees of Arsenal Building Corporation are not engaged in commerce within the meaning of the Act.

In view of its decision that the employees of the Arsenal Building are employed in producing goods for commerce the Circuit Court found it unnecessary to decide whether or not they were engaged in commerce. There is every reason to assume, however, that this point will be urged by the Administrator.

The complaint, as it was originally filed, contained no contention that the Arsenal Corporation employees were engaged in commerce, but relied solely on the contention that they were engaged in the production of goods for commerce. In March of 1941, however, the complaint was amended to cover this point.

According to Section 3(b) of the Act, "commerce" means "trade, commerce, transportation, transmission or communication among the several states or from any state to any place outside thereof". Isolated transactions, we submit, do not come within the statute's definition of "commerce".

Putting aside for the moment the duties of porters, carpenters and watchmen, we come frankly to grips with this contention by dealing with elevator operators, whose duties represent the strongest case for the contention that the employees in question are engaged in commerce. The elevator operators merely operate a local facility within the building. Truckmen, employed by independent contractors engaged by the tenants, come upon the leasehold premises of the manufacturing tenants, and there take possession of the goods to be shipped, by loading them into elevators which take them to the ground floor. These same truckmen then unload the goods, carry them to the street, and put them on the trucks. The elevator operators merely operate the elevators and, in the ordinary course of their duties, do not handle the goods or even cross the property line of the tenants. Such employees, we submit, are not engaged in "commerce" within the meaning of the statutory definition of that word.

In the case of *New York ex rel. Pa. Railroad Co.* v. *Knight*, 192 U. S. 21, the Court had before it the constitutionality of a franchise tax imposed by the State of New York on a cab service owned and operated by the Railroad Company from points in the City of New York to railroad terminals. The Railroad urged that such cabs were engaged in interstate commerce and were, therefore, immune from state taxation. This Court, in a unamious opinion by Mr. Justice Brewer, said, at page 28:

> "As shown in the opinion from which we have just quoted, many things have more or less close relation to interstate commerce which are not prop-

erly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?"

See also:

U. S. v. *Baltimore & O. S. W. R. Co.*, 222 U. S. 8;
Heitler v. *U. S.*, 244 Fed. 140;
Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 2700, 75th Congress, First Session (1937) at p. 43.

The remarkable similarity between the language used in the Quarantine Statute, and the White Slave Act, dealt with in the two cases last above cited, when compared with the language used in the definition of "commerce" in the Fair Labor Standards Act, gives these cases special force.

This argument, treating the elevator service as a separate movement, has particular force where the intrastate movement is contracted and paid for independently of the interstate movement.

Puget Sound Stevedoring Co. v. *Tax Commission*, 302 U. S. 90.

In the light of the argument set forth in Point I (*supra*), we submit that the foregoing decisions are conclusive in favor of the defendants.

POINT IV.

The employees of Arsenal Building Corporation are engaged in working in a "service establishment" exempted from the Fair Labor Standards Act.

The Circuit Court ruled that defendants were not a service establishment but were actually engaged in producing goods for commerce. If practical common use of words and concepts are of value this holding cannot stand.

At the close of the testimony, defendants, pursuant to Rule 15 of the Rules of Civil Procedure, and with the approval of the Court, amended their answer to allege an additional affirmative defense as follows:

> "That the defendant Arsenal Building Corporation and the defendant Spear & Company, Inc. as its agent, are engaged in the operation of a service establishment within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act, and are therefore exempted from the application of the Act" (R. 254).

The section of the Act referred to by the amendment is as follows:

> "Section 13(a). The provisions of sections 6 and 7 shall not apply with respect to
>
> * * * * *
>
> (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *"

The legislative history of the Act tends to support our exemption claim.

Although the original Bills contained no specific exemption for service establishments (see for example the House Bill as contained in Report No. 2182, House of Representa-

tives 75th Congress, 3rd Session, April 21, 1938 to accompany S. 2475, at page 4) it was clear that Congress did not intend to legislate with respect to such matters. Thus, the Hon. ROBERT H. JACKSON, testified that:

> "It was not intended by this Bill to apply generally to retailers or to apply to the service trades, such as the filling station attendant and the pants presser and small business generally."

Further, Mr. Jackson testified:

> "• • • but, generally speaking, the policy of the Bill is not to include the service trades and small businesses and the retailing enterprises."

Again, Mr. Jackson stated that the purpose of the legislation was to leave——

> "to the State and local communities themselves the power of regulating the small business units that affected the local community only."

Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 2700, 75th Congress, 1st Session (1937) pages 35, 36.

At another place, he added:

> "• • • but, as I said at the outset under Senator Black's question, it is not intended by this Bill to affect the retail trades or the service trades. It is intended to catch the unfair labor practices *at the point of production.*" (Italics supplied.)

Joint Hearings Before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 2700, 75th Congress, 1st Session (1937) pp. 39-40.

Further evidence that the Act was not intended to extend to service trades and other local businesses is found in the Report of the Senate Committee on Education and Labor which recommended passage of S. 2475. The report stated:

> "The bill carefully excludes from its scope *business* in the several States that is *of a purely local nature.* It applies only to the industrial and business activities of the Nation in so far as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce. *It leaves to State and local communities their own responsibilities concerning those local service and other business trades that do not substantially influence the stream of interstate commerce.* For example, the policy in this regard is such that it is not even intended to include in its scope those purely local and small business establishments that happen to lie near State lines, and solely on account of such location, actually serve a wholly local community trade within two States." (Italics supplied.)
>
> *Report of the Senate Committee on Education and Labor to accompany S-2475*, 75th Cong. 1st Sess. Senate Cal. No. 905, Report No. 884 at page 5.

Furthermore, Senator Black then Chairman of the Senate Committee made clear that there was no intention of regulating local business units. He stated:

> "The general purpose of the bill, legislatively speaking, is a three fold one:
>
> "It provides a method of obtaining the objectives of minimum wages and maximum hours in industries throughout the Nation which engage in the transportation of *their* goods in interstate commerce. It is not intended to, and does not, attempt to provide by Federal legislation the fixing of minimum wages and maximum hours of employment in all the varied peculiarly *local business units* of the Nation." (Italics supplied.)

This same idea was reiterated and emphasized a few paragraphs later, where he said:

> "So the bill, in so far as it relates to maximum hours of employment and minimum wages, is limited, except to the small extent I have heretofore indicated, to goods which are actually manufactured for transportation and are transported in interstate commerce. We therefore eliminate in the beginning any idea that this is an effort to regulate wages and hours in *the various service employments* throughout the Nation.
>
> "That is done for two reasons. In the first place, the bill rests squarely upon the interstate-commerce clause of the Constitution. In the second place, I believe it was the prevailing sentiment of the committee, if not the unanimous sentiment of the committee, that *businesses of a purely local type which serve a particular local community*, and which do not send *their* products into the stream of interstate commerce, can be better regulated by the laws of the communities and of the States in which the business units operate." (Italics supplied.)

81 Cong. Rec., page 7648.

The specific exemption, as it now exists in the Act, appeared for the first time in the draft of the statute contained in the Conference Report.

> Report No. 2738, House of Representatives, 75th Congress, 3rd Session, June 11, 1938, Conference Report (to accompany S. 2475) p. 9.

As pointed out on the floor of Congress, by Congressman Celler, the specific exemption was inserted to make sure that the legislative intent alluded to above would be made effective.

82 Cong. Rec. 7438.

From the fact that the Act contains no definition of "service" or "servicing", it is apparent that the Congress intended that these terms should be given a common sense interpretation, consistent with the basic purpose the Congress had in mind: that of excluding from the operation of the law local businesses with which only the local community is concerned.

* * * * *

It is noteworthy that the labor union which represents the employees here involved for purposes of collective bargaining is called the Building Service Employees International Union (R. 68), and is dealt with by the State, and not the National Labor Board (R. 265). Likewise, the industry in which this labor union operates is almost without exception referred to as the Building Service Industry. In situations of this character, the common appellations coined and used by the parties entirely apart from any thought of legislative control should be entitled to weight.

Mr. Justice Holmes, speaking for this Court in the case of *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170, stated that "*services*" of the nature of those performed by the employees involved in this case

> "constitute the universal and necessary incidents of modern apartment houses" (256 U. S., at page 199).

Plaintiff admits that apartment houses and hotels are service establishments within the meaning of Section 13 (a) (2) (R. 262), and yet there is no difference whatever between such buildings and a loft building as respects the character of the jobs performed by the employees. All of these buildings, where real estate is leased to tenants, are serviced by employees of the identical types described in this record.

In an effort to establish that the Arsenal Building is a manufacturing establishment, and not a service establishment, plaintiff has relied upon the decision of the Supreme

Court of Michigan in the case of *Barfoot* v. *White Star Line*, 170 Mich. 349. The case is not in point. There, plaintiff, who was injured while working in a building tenanted by a manufacturing concern, sued the owner of the building for damages. The cause of action rested upon a state statute imposing a duty upon the agent, owner or lessee of any "manufacturing establishment, etc." to install and maintain certain safety apparatus. The Court sustained recovery against the lessor stating the "manufacturing establishment" meant premises in or on which a manufacturing business is conducted.

Application of that statute to the Arsenal Building might mean that a tenant's premises would be a "manufacturing establishment", but would not in any way mean that other parts of the building not devoted to manufacture, but solely to the common utilities and the furnishing of service, would be considered to be a "manufacturing establishment". The premises with which this case is concerned are the unleased premises in the possession of the defendants, in which premises alone the employees of Arsenal Corporation carry on their work.

If State authorities are to be deemed important the case of *Commonwealth* v. *Arrot Mills Co.*, 145 Pa. 69, should be considered, for there it was held that a landlord was not engaged in manufacturing although it rented space to manufacturers and supplied steam and motive power to them.

To approach the problem from another viewpoint, let us assume, for illustration, that the Arsenal Building Corporation owns a factory building situated in a field in rural New Jersey, and leases the entire factory to a concern like Max Wiesen & Sons, one of the Arsenal Building Corporation tenants, so that Max Wiesen may manufacture ladies' garments for interstate commerce. Let us assume further that Arsenal Building Corporation employs one person to cut the grass on the grounds surrounding the

plant occupied by Max Wiesen. Such employee is obviously engaged in servicing within the meaning of the exemption. The same is also true as to other types of service performed in or about the care and operation of the building and its appurtenances. Included in this category would be the servicing of package chutes, elevators, elevator machinery, steam boilers, toilet facilities and the like, which are a part of the real property. It is unquestionably this state of affairs which the District Court had in mind when it said:

> "It seemed to me as the trial progressed that the government had, in its attempt to tie up the employees of the defendants with 'production of goods for commerce', proved beyond any peradventure that the defendants Arsenal Building Corporation and Spear & Company, Inc. as its agents were 'service establishments' all of whose servicing was in intrastate commerce and I so find" (R. 337).

Plaintiff has relied upon Interpretive Bulletin No. 6, issued by himself as an aid to the interpretation of the statute (R. 23). It should be noted that plaintiff administrator is not given the power of definition as to the terms of Section 13 (a) (2), as he is granted under Section 13 (a) (1) with respect to the terms there used.

Assuming, however, that the bulletin is to be considered, defendants submit that it brings the Arsenal Building clearly within the definition of a service establishment.

For example, the bulletin points out that service establishments ordinarily sell services or labor rather than goods. That such may be a fair and reasonable test is pointed out in the case of *Stucker v. Roselle*, 37 Fed. Supp. 864, at 867. It is clear that the Arsenal Building is not engaged in the sale of goods, for the term "goods" is defined in Section 2 (i) of the Act as meaning "goods * * * wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof * * *".

The sales of electricity, which involves none of the employees here under consideration, are clearly retail sales.

To take another illustration from Interpretive Bulletin No. 6, it is said that a service establishment is local in character, and renders service to the ultimate consumer for direct consumption. As has been pointed out heretofore, no establishment can be conceived to be more local in character than a parcel of real property subject as it largely is, to the law of the situs. Moreover, the services rendered by the employees of Arsenal Corporation, if not rendered solely to the real estate, as herein contended, are rendered to the ultimate consumer, whether it be the tenant or the invitees or licensees of the tenant. And finally, it is certain that the services are rendered for direct consumption, for one cannot imagine a situation wherein a trip upon an elevator in the Arsenal Building could ever be recalled, resold or reused for any purpose.

Interpretative Bulletin No. 6 also asserts that the services exempted are most usually performed to meet the personal needs of private consumers, and not to meet the needs of business concerns. It is submitted that this test is erroneous because it is apparent that a service station engaged in the washing of automobiles and trucks would, nevertheless, be a service establishment if it washed a fleet of trucks engaged in interstate commerce, nor would a filling station be any the less a service establishment because it sold gasoline, washed wind-shields and checked oil for that same fleet of trucks.

(See testimony of the Hon. Robert H. Jackson, at p. 28 of Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 2700, 75th Congress, 1st Session (1937)).

Ostensibly, service means, in at least one aspect, that an article belonging to another, such as an automobile to be

washed, a pair of shoes to be shined and the like, is worked upon in such a manner as not to change the basic character of the article. The business or occupation of removing a dress from the 20th floor to the street level, creating, as it does, no change whatever in the essential identity of the dress must be classified as a service rendered to the owner of the dress. To carry the point one step further, a shoe repair establishment is admittedly a service establishment within the meaning of the exemption, and yet it is apparent that a pair of shoes with new soles and heels is to a large extent a basically different article than a pair of shoes with run-down heels and worn-out soles.

Finally, it cannot be said that the Congress, in using the terms "retail or service establishment" in Section 13 (a) (2) of the Act, intended merely to exempt those service establishments which are similar to retail establishments. The material referred to above in discussing legislative history, demonstrates that the Congress intended to exclude from the operation of the law the retail trades *and* small businesses, *and* the service trades (see pp. 29-31 above). Moreover, this point is reflected in the language of the Act, for retail employees are twice exempted, first if employed in a "local retailing capacity" (Section 13 (a) (1)), and second if employed in a "retail establishment" (Section 13 (a) (2)). In the case of a "service establishment", *all* employees are exempt without qualification or other specification (Section 13 (a) (2)). Unless this language employed by Congress is deemed to be surplusage, it seems indisputable that service establishments are to be considered upon the basis of their own characteristics, and not upon the basis of a fancied kinship to the retail trades.

Defendants' position, simply stated, is that the character of the occupations represented in the Arsenal Building is such that they can fairly and reasonably be classified only as service occupations performed either upon the real property itself or for the tenants and those associated

with them, and are not occupations which can be identified with the production of any particular goods for commerce, or which can be called necessary for production, as distinguished from these necessary for the enterprise as a whole.

This Court, we believe, may take judicial notice of the fact that no industry committee has been appointed under appropriate sections of the Act for the Real Estate Industry, or any part of that industry, although it is the mandatory duty of the Administrator to make such a move as to industries covered by the Act. It is nowhere asserted that plaintiff is even considering such a step. This fact demonstrates that the Administrator in the exercise of his duties under the law does not consider the industry to be covered.

It must be concluded, therefore, that the servicing shown in this record is exclusively local and intrastate in nature, within the judgment of the administrator, within the express terms of Section 13 (a) (2) of the Act, and within the zone of activity which the Congress has declined to enter.

POINT V.

The Act applies only to employees of employers engaged in commerce or the production of goods for commerce, and then only to such of said employees as are themselves engaged in commerce or the production of goods for commerce.

This point was urged on the Circuit Court in *haec verbis*, and in substance means that the coverage of the Act calls for the dual test that both *employer* and *employee* must have the required relationship to interstate commerce. With this premise, it was argued in the Circuit Court that the Act had no application here because neither the Arsenal Building Corporation nor Spear and Company were en-

gaged in interstate commerce, or the production of goods for interstate commerce. Apparently, the Circuit Court met this point by finding in effect that an employer "like the defendant" was "engaged in the production of goods for commerce" (R. 347). That seems to be an acceptance of our Point V. The Court then proceeded to a discussion which deals with matters that were never in the mind of counsel for defendants. From the point of view of defendants, the Circuit Court thus set up a man of straw and knocked him down (R. 347).

A.

Our contention is that the defendants are not engaged in producing goods for commerce and therefor the Act does not apply. The Circuit Court holding that the defendants are engaged in producing goods is so contrary to all concepts and facts heretofore entering the minds of lawyers or laymen that we do not undertake further to combat it.

Our contention that the Act does not apply unless the employer himself is engaged in commerce, or the production of goods for commerce, is based on the specific words of Sections 5 and 8, dealing with "Industry Committees" as well as upon the general structure and purpose of the Act.

There are two ways in which wages may be fixed under the Act: (1) the automatic operation of the Act under Section 6, and (2) the more flexible arrangements through consultation with "Industry Committees," as provided in Sections 5 and 8.

Section 5 provides for the appointment by the Administrator of a "industry committee for each industry engaged in commerce or the production of goods for commerce."

Section 8 provides machinery whereby said committees, acting with the Administrator, may accelerate the standard of 40¢ per hour, or at the end of seven years may retard

the adoption of the standard of 40¢ per hour, by providing for lower rates not less than 30¢ per hour, thus importing flexibility into the wage provisions of the Act. At the same time, it should be noted that such activities of the Committee are limited to "each industry engaged in commerce, or in the production of goods for commerce," and to "employers engaged in commerce or in the production of goods for commerce."

Turning now to Section 6, we find that its mandatory provisions apply without discrimination to the minimum wages fixed by either of the two methods. Therefore, when Section 6 refers to "every employer" without qualification, it seems clear to us that it means employers engaged in commerce, or the production of goods for commerce. We certainly cannot ignore the use of the express qualifying words as they appear in Sections 5 and 8, but it is not doing violence to the purpose of the Act to assume that the omission of the qualifying words in Section 6 dealing with wages, and Section 7 dealing with hours, was not deliberate, for the purpose of extending the Act in some of its features to employers not related to commerce. On the other hand, it would do violence to the entire structure of the Act to assume that the minimum wages fixed after consultation with "industry committees" applied only to employers having the specified connection with commerce, while the minimum wages, automatically taking effect without consultation with such committees, applied to employers who had no connection with commerce, or the production of goods therefor. The fact that Section 6 deals identically with minimum wages arrived at by either of the methods in question shows that no such discrimination was intended. Subdivision 3 of Section 6(a) prescribes the minimum rate after the seventh year of the Act by requiring the employer to pay either the automatic wage of 40¢ per hour, or the rate not less than 30¢ per hour prescribed by the Administrator under Section 8, after consultation with the Industry Committee. Thus, the employer, after the ex-

piration of seven years, has the right to pay the wage fixed under Section 8, even though it is lower than the automatic rate of 40¢. But if the employer were not in an "industry engaged in commerce, or the production of goods for commerce," within the meaning of Sections 5 and 8, there would be no alternative rate, all of which shows the absurdity of claiming that the words "every employer" extend beyond employers having the specified relation to commerce. Subdivision 4 of Section 6 (a) involves the same problem in dealing with the mandatory minimum wages to be in effect for the period preceding the expiration of seven years after the enactment of the law. Under this subdivision, the 40¢ rate may be adopted through consultation with an industry committee at an earlier date than is otherwise prescribed in Section 6, but in the absence of such arrangements through the industry committees, the automatic step-ups of the minimum wage, as prescribed in Section 6, take effect.

In view of the way in which those provisions are interwoven, it seems clear that the statute at all times intended that the group of employers to be covered remain the same, and did not contemplate that employers not having the prescribed relationship to interstate commerce would be subject to the automatic provisions of the Act, while those who did occupy the prescribed relationship to interstate commerec might be subjected to other standards through consultation with industry committees.

If our argument in this respect is sound, it also follows that Section 7, which deals with maximum hours, also intended to cover only the employers engaged in interstate commerce, or in the production of goods therefor, notwithstanding the fact that it uses the unqualified words "no employer." This is further borne out by examination of the provision of Section 7(b) which refers to actions of the National Labor Relations Board. If the provision were intended to apply to all employers, the language might

well have included State Labor Relations Boards under whose jurisdiction employers not related to commerce might come.

This Court, in referring to Sections 5 and 8 of the Act, has said:

> "The Act also sets up an administrative procedure whereby those standards may from time to time be modified generally as to industries subject to the Act or within an industry in accordance with specified standards, by an administrator acting in collaboration with 'Industry Committees' appointed by him."
>
> *United States* v. *Darby Lumber Company*, 312 U. S. 100, at p. 110.

We submit that this language means that all industries subject to the Act are also subject to the provisions dealing with "industry committees," and that, therefore, the descriptions of the type of employers covered by this Act are to be found in Sections 5 and 8, dealing with industry committees. From this, it follows that only employers engaged in commerce, or the production of goods for commerce, are covered by the Act.

We further submit that this entire argument is borne out by the general purpose and structure of the Act.

Section 2 of the Act sets forth in a general way the economic theory which underlies the purpose of the Act. It was felt that certain labor standards in the production of goods could not be maintained against substandard employment conditions in the production of goods, if goods produced under substandard conditions were allowed to compete in the markets of the nation with goods produced under higher employment standards.

> *United States* v. *Darby Lumber Company*, 312 U. S. 100.

Section 2, therefore, refers only to "*industries engaged in commerce, or in the production of goods for commerce*".

It finds the fact that substandard conditions of employment in such industries were able, through the instrumentality of interstate commerce, to perpetuate such unfair conditions through unfair methods of competition which interfered with fair marketing of goods; and that such substandard conditions burdened commerce and led to labor disputes obstructing commerce.

In the face of this Section, and despite the emphasis placed upon it by this Court, in the *Darby* case, plaintiff withdrew paragraph 9 of the complaint in this case covering this point (R. 28), and offered no proof whatever that the activities of defendants interfered with or burdened commerce because of unfair methods of competition. Obviously the plaintiff found himself unable to meet the fundamental purpose of the Act.

In subdivision "b" of Section 3, commerce is defined as follows:

> "(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

Transportation is largely eliminated, because under Section 13 of the Act, railroads, water carriers, trolleys, buses, etc. are excepted. Moreover, under this definition, transportation is limited to transportation "among the several states or from any state to any place outside thereof", which, of course, excludes building service elevators.

Subdivision "j" of Section 3, through language of strict limitation, defines the conditions under which an employee shall be held to be engaged in production, for commerce.

These provisions indicate that the Act was intended to have no application to employers who were not engaged in commerce, or the production of goods for commerce, even though they might have an isolated employee or two who occasionally was engaged in commerce, or the pro-

duction of goods for commerce. This argument is further strengthened by the provisions of subdivision "c" of Section 11, which requires the preservation of elaborate records relative to *all* persons employed by "every employer subject to any provision of this Act". Surely, Congress is not presumed to have intended to extend this burdensome requirement to all employees of an employer, who, by and large, was not engaged in interstate commerce, even though one of his employees might be so engaged.

All these provisions give force to the argument that Congress, by the use of the words "every employer" in Section 6, and the use of the words "no employer" in Section 7 meant to include only employers in industries "engaged in commerce or in the production of goods for commerce".

Farr v. *Smith Detective Agency and Nightwatch Service, Inc.*, 38 Fed. Supp. 105;
Baggett v. *Henry Fischer Packing Company*, 37 Fed. Supp. 670.

In the case of *Killingbeck* v. *Garment Center Capitol, Inc.*, 259 App. Div. 691, the Court, in a unanimous opinion, held that employees, like a watchman or maintenance carpenter, are not covered by the Act when employed by some one other than the producer for interstate commerce. Section 15(b) of the Act, which provides that employment in a factory within ninety days prior to the removal of the goods in question shall be prima facie proof that the employee was engaged in the production thereof, mentions only employees employed directly by the producing company.

We repeat that since the words "affecting commerce" were removed from the Act and since as stated in *Federal Trade Commission* v. *Bunte Brothers Inc.*, 372 U. S. 349, this Court will not infer any intention on the part of Congress to deal with intrastate matters the reasonable conclusion is to limit the application of the Act as above set forth.

We think, also, that the legislative history of the Act, discussed by the Circuit Court, proves just the opposite of what is claimed by the Circuit Court. It shows that the change effected by the Conference Committee of Congress was merely to avoid covering employees who were not actually engaged in the production of goods for commerce, and there is no indication of an intention to so change the bills as to include employers not themselves engaged in producing goods for commerce.

Indeed, as pointed out by the Hon. ROBERT H. JACKSON, there would be grave danger of the law being held unconstitutional if it were not for the flexibility in standards of wages provided for by Sections 5 and 8.

> *Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor on S. 2475 and H. R. 2700, 75th Congress, 1st Session (1937)* p. 27.

The statement of the Circuit Court (R. 348) that Senator PEPPER stated "that the only test should be the occupation of the employees" is a positive inaccuracy (see PEPPER statement, *supra* p. 15). These remarks of the Senator did not enlarge the group of *employers* to which the Act applied but narrowed the group of *employees*.

Where, therefore, it appears that any activity is not involved in maintaining standards in interstate competition, it may fairly be presumed that Congress did not intend in the absence of such an exigency to violate the usual rule of local self-government. Referring to such a principle of interpretation, this Court, in the case of *U. S. v. American Trucking Associations*, 310 U. S. 534, said, at p. 543, concerning the interpretation of acts of Congress:

> "Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole, this Court has followed that purpose rather than the literal words."

B.

Let us turn now to the next limitation. Even where the employer is subject to the Act, only those of his employees who are engaged in interstate commerce, or the production of goods therefor, are subject to the Act. This point is conceded by the Administrator, and is too clear to call for elaborate discussion, but the concrete contentions of the Administrator seem to be entirely inconsistent with its concession, since he has not as yet pointed to any class of employees of a concern engaged in interstate commerce which he concedes to be beyond the application of the Act. The defendants on the other hand contend that only those employees are covered whose services are directly identifiable with the production of some particular line of goods, part of which at least are intended for commerce.

Section 6, dealing with minimum wages, and Section 7, dealing with maximum hours, are expressly limited in their application to employees "engaged in commerce or the production of goods for commerce". Subdivision "b" of Section 15 provides as follows:

> "(b) For the purposes of subsection (a) (1) proof that any employee was employed in *any place of employment* where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment shall be prima facie evidence *that such employee was engaged in the production of such goods.*" (Italics supplied.)

Thus, the Act, by its express terms, clearly points to the requirement of distinguishing between employees of the same employer, who are covered and who are not covered and offers an opportunity to overcome the *prima facie* conclusion that a particular employee is engaged in the "production of goods for commerce". The test is whether the employee in question is definitely associated with the production of goods for commerce.

POINT VI.

If the Act were interpreted to apply to the employees of the Arsenal Building Corporation, it would be void for lack of Congressional power.

It is too well settled to require an extended citation of cases that Courts will avoid any construction of an Act which will lead to its downfall as being unconstitutional.

Missouri Pacific Railroad Co. v. *Boone*, 270 U. S. 466;
Schieffelin v. *Goldsmith*, 253 N. Y. 243;
Killingbeck v. *Garment Center Capitol, Inc.*, 259 A. D. 691.

Numerous decisions of this Court point to the conclusion that the occupations of building service employees, employed by landlords not engaged in trade, production or commerce, are beyond the reach of federal regulations.

Schechter Poultry Corporation v. *U. S.*, 295 U. S. 495.

The Court should not, therefore, by implication, expand the language of the Act in such a way as to raise grave doubts as to its validity, by reason of the doctrine set forth in the case above cited.

CONCLUSION.

It is therefore respectfully submitted, for the reasons above set forth, that the judgment of the Circuit Court should be reversed.

Respectfully submitted,

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